1959

Leonard Meads v. Richard C. Dibblee and Merill B. Colton : Brief of Appellant

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; John L. Black; Counsel for Plaintiff and Appellant;

Case No. 9080

In The Supreme Court of the State of Utah

LEONARD MEADS,

Plaintiff and Appellant,

—vs.—

RICHARD C. DIBBLEE, Administrator of the estate of JOHN RICHARD SALMON, Deceased, and MERRILL B. COLTON,

Defendants and Respondents.

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The parties will be referred to as in the Court below. All italics are ours.

STATEMENT OF FACTS

This lawsuit was commenced for the wrongful death of Ellen Meads, a minor child, in an accident which occurred at approximately 10:45 p.m. on the 10th day of

June, 1958, on U.S. Highway 91, approximately 200 feet east of 5th East Street at American Fork, Utah County, Utah. Plaintiff Leonard Meads is the father of the deceased minor, Ellen Meads, and filed this lawsuit pursuant to the provisions of 78-11-6, Utah Code Annotated, 1953. Defendant Richard C. Dibblee was duly appointed Administrator of the Estate of John Richard Salmon, deceased.

Plaintiff alleged that immediately prior to the occurrence complained of, the deceased, John Richard Salmon, was driving a 1951 Mercury 4 door sedan, in an easterly direction along U.S. Highway 91 and approaching the scene of the occurrence heretofore mentioned; that at said time the deceased Ellen Meads was in said vehicle; that travelling some distance behind said Mercury automobile and also proceeding in an easterly direction was a 1954 Kenilworth truck and trailer owned and driven by defendant Merrill Byron Colton; that as the said Mercury automobile was proceeding along, deceased John Richard Salmon pulled off the right hand edge of said highway and then turned to his left and in front of the approaching Kenilworth truck and trailer and that, thereafter, said truck and trailer came with great force and violence into impact with said Mercury automobile, thereby and thus causing and bringing about the deaths of John Richard Salmon and Ellen Meads (R-2).

Plaintiff further alleged that at the time and place heretofore mentioned, deceased John Richard Salmon was guilty of wilful misconduct in that well knowing of

the approach of the Kenilworth truck and trailer and at a time when he knew of the great risk involved, he, nevertheless, undertook to make a left turn in front of said truck and trailer (R-2).

Plaintiff further alleged that defendant Merrill Byron Colton was negligent in (a) not keeping a proper lookout, (b) not keeping said Kenilworth truck and trailer under safe, proper and immediate control, (c) driving at an excessive rate of speed, and (d) not giving adequate and sufficient warning of his approach.

Plaintiff alleged that the wilful misconduct on the part of John Richard Salmon and the negligence on the part of Merrill B. Colton, proximately caused the injuries resulting in the death of said Ellen Meads (R-3).

It was subsequently ascertained through the depositions of Leonard Meads and Ella Meads, parents of the deceased child Ellen Meads, that Ellen Meads and John Richard Salmon were engaged to be married and had gone for an automobile ride. It was further developed that John Richard Salmon died as a result of the accident in question shortly after said accident and that Ellen Meads died as a result of injuries received in said accident on June 17, 1958, approximately one week after the accident. It was admitted at pre-trial that the said John Richard Salmon died as a result of the accident in question prior to the time of the death of the said Ellen Meads, also as a result of the accident.

At pre-trial, counsel for defendant Richard C. Dib

blee, Administrator of the Estate of John Richard Salmon, made a motion to dismiss the action as against said defendant on the ground and for the reason that 78-11-12, Utah Code Annotated, 1953, did not include said action within its provisions for the reason that the wrongful death action for the death of Ellen Meads did not arise until her death on June 17, 1958, which was subsequent to the death of John Richard Salmon. The judge hearing the pre-trial assigned the case to the trial calendar and continued the matter to May 25, 1959 at 2:00 o'clock p.m. for further argument on said defendant's motion. On May 25, 1959 at 2:00 o'clock p.m., the motion was further argued by counsel before the Honorable Aldon J. Anderson, one of the judges of the Third Judicial District Court. Memorandums of authorities were submitted by counsel for both sides. On the 28th day of May, 1959, the Honorable Aldon J. Anderson granted judgment in favor of Richard C. Dibblee, Administrator of the Estate of John Richard Salmon, deceased, dismissing the lawsuit as against said defendant on its merits and with prejudice, and allowing said action to continue for trial as against the remaining defendant (R-22). On the 10th day of June, 1959, plaintiff filed a petition for order granting intermediate appeal with the Supreme Court (R-26), and subsequently on the 16th day of July, 1959, the Supreme Court entered an order granting an intermediate appeal from the order entered on May 28, 1959, by the District Court of Salt Lake County (R-25).

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ORDER IS VIOLATIVE OF THE CLEAR INTENT OF THE UTAH LEGISLATURE IN ENACTING 78-11-12, UTAH CODE ANNOTATED, 1953.

ARGUMENT

POINT I

THE TRIAL COURT ORDER IS VIOLATIVE OF THE CLEAR INTENT OF THE UTAH LEGISLATURE IN ENACTING 78-11-12, UTAH CODE ANNOTATED, 1953.

Plaintiff filed this action as the father of his deceased minor child pursuant to the terms of 78-11-6, Utah Code annotated, 1953, which states in part as follows:

> "Except as provided in chapter 1, of Title 35, a father, or in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child when such injury or death is caused by the wrongful act or neglect of another; * * * Any such action may be maintained against the person causing the injury or death, or, if such person is employed by another person who is responsible for his conduct, also against such other person."

In the 1953 session of the Utah Legislature what is now designated as 78-11-12, Utah Code Annotated, 1953, was enacted into law. Said section reads as follows:

> "INJURY TO PERSON OR DEATH—NO ABATEMENT OF CAUSE OF ACTION UPON DEATH OF WRONGDOER — ACTION

> AGAINST PERSONAL REPRESENTATIVE OF WRONGDOER — EVIDENCE REQUIRED —Causes of action arising out of physical injury to the person or death, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal representatives of heirs of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; provided, however, that the injured person or the personal representatives or heirs of one meeting death shall not recover judgment except upon some competent satisfactory evidence other than the testimony of said injured person."

The title of the act in the bill states as follows:

> "An act providing for the survival of a cause of action arising out of an injury or death after death of the wrongdoer, and providing that such cause of action shall not abate upon the death of the wrongdoer, and providing further that the injured person or personal representatives of one meeting death shall have a cause of action against the personal representatives of the wrongdoer, and providing that the injured person in such cases shall not be entitled to a recovery except upon competent evidence other than the testimony of the injured person."

As will be remembered, the common law does not provide for death actions by an injured party's representatives or against the representatives of a wrongdoer. The State of Utah has expressed its antipathy to this common law attitude, and it is in this atmosphere that the foregoing statutes were enacted. Article 16, Section 5,

of the Utah Constitution clearly expresses this antipathy to the common law attitude as follows:

> "The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided by law."

The Utah Legislature did not intend that any such technical limitations, as are urged by defendant, should be imposed on the rights granted by 78-11-12, U.C.A. 1953. The wording "*causes of action arising out of physical injury to the person or death, caused by the wrongful act or negligence of another*" clearly indicates that the statute gives the right of action for either physical injury or death against the estate of the wrongdoer. The statute provides for no limitation on this right and states nothing whatsoever as to any requirements concerning who should die first. The title of the act itself gives a clear indication of legislative intent when it is stated "*an Act providing for the survival of a cause of action arising out of an injury or death after death of the wrongdoer, and providing that such cause of action shall not abate upon the death of the wrongdoer.*" The construction contended for by defendant would emasculate this statute and would thwart the clear intent of the Legislature in enacting such statute. Inasmuch as the intent is clear from the wording of the statute, it is respectfully submitted that the court should not resort to fictions created by common law in order to defeat such statute. Such a construction as asserted by defendant would create such an anomalous re-

sult that in a case where two persons are killed in an accident by the negligence of another, one dying before the wrongdoer and one dying after the wrongdoer, the representative of the person dying before the wrongdoer would have a cause of action and the representative of the person dying after the wrongdoer would not have a cause of action. Certainly, if the Legislature had meant to so limit this statute, it would have so stated, but instead, the statute in sweeping language, states that causes of action arising out of physical injury to the person or death, without any limitation, may be brought against the estate of the wrongdoer. It seems that nothing could be clearer than the language of this statute.

Defendant relied mainly on the recent Utah case of *Fretz v. Anderson*, 1956, 300 P. 2d 642, 5 Utah 2d 290, as authority for the strange proposition which he urged on the trial court. The question involved in the Fretz case had nothing to do with that involved here. The question dealt with was whether or not the deceased wrongdoer had died before the accident in question. This court held that the question should be given to the jury as to whether or not said decedent had died in the initial overturning of the vehicle or in the subsequent accident in which the plaintiffs were injured. The holding in that case was merely that the jury would have to find that the decedent was alive at the time of the accident in order to return a verdict against deceased's estate. It will be remembered that in the case at bar there is no question but what the deceased, John Richard Salmon, was still alive at the time of the accident in question.

This court in the Fretz case, at page 649 cited cases from other jurisdictions and apparently approved of the reasoning of said cases, to the effect that this type of remedial statute is to be construed liberally. These cases will be mentioned hereinafter, and it is submitted that they sustain the appellant's position in the case at bar. Other cases which will be cited herein also affirm the proposition that such statutes, as the one in question, are remedial and should be construed liberally.

Although it is true that the wrongful death cause of action is not complete until the injured person has died, it is submitted that the foundation of the cause of action is the original injury and that the subsequent death is merely a final occurrence which causes it to ripen into a case. The Supreme Court of the United States has recognized this basic principle in the case of *Francis v. Southern Pac. Co.*, 162 F. 2d 813, 333 U.S. 445, 92 L. Ed. 798, 68 S. Ct. 611, where it was held that the wrongful death action is a derivative action in the ordinary meaning of the term, but that the foundation of the right of action is the original wrongful injury and that there can be no recovery under such a statute unless the decedent could have recovered damages for his wrongful injuries if he had survived. In accordance with this philosophy recognizing that the foundation of the cause of action for death is the original injury, this court has held that contributory negligence of the deceased is a bar to the action brought by the heirs of the deceased for their damages on account of his death. This court has held this even though, technically speaking, the death action does not

arise until the death of the injured person and it is an action not for his injuries but a separate action for the loss suffered by the heirs on account of his death. See *Van Wagoner v. Union Pacific,* 186 P. 2d 293, 112 U. 189.

The case of *Kerr v. Basham, South Dakota* (1935), 252 N.W. 853, 253 N.W. 490 and 264 N.W. 187, was cited by the Utah Supreme Court in the Fretz case at page 649, and appears to be squarely in point as to the issues which have been raised by defendant in the case at bar. The Kerr case involved a death action against the administrator of the tort-feasor arising out of a collision in which plaintiff's decedent died after defendant's decedent. The court stated at page 854:

> "It is true that, if Basham predeceased Bennett, there would be no cause of action existing against Basham for Bennett's death at the moment of Basham's decease, but the foundation of liability was, nevertheless, existent. The liability of Basham (or his estate) is predicated fundamentally upon his wrongful conduct in inflicting upon Bennett the injury of which Bennett subsequently died. The situation is comparable to the contingent liability of a surety on a fidelity bond which never ripens into a cause of action unless and until the principal defaults. The liability of Basham existed in contingent and inchoate form from and after the moment that he inflicted the injury; the condition subsequent which was necessary to ripen such contingent liability into a cause of action being the death of Bennett as a result of the injury. When Bennett died from the injury, the liability previously contingent became absolute, and the cause of action accrued, and under

> this particular statute we believe it accrued against Basham, if living (with survival against his estate if he subsequently died), or against Basham's estate, as such, if he had predeceased Bennett. In view of the language of our statute, we do not believe it was intended that the existence of the cause of action for wrongful death should depend upon whether or not the wrongdoer survived his victim."

The statutes involved in South Dakota are similar to the statutes which exist in the State of Utah. The wrongful death statute in South Dakota creates a new cause of action for the benefit of the stated heirs, and the statute creating the liability against the estate of the deceased wrongdoer states in part as follows:

> "* * * the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured; ***"

The Kerr case contained a logical argument if it be thought necessary, by which the fiction asserted by defendant in the case at bar can be swept aside, and that is, that the wrongful death action existed from the moment of the negligence of the wrongdoer in an inchoate form with the condition subsequent to ripening into a full blown cause of action being the later death of the victim. Certainly the matter of importance is the wrongful conduct of the deceased wrongdoer. Once being guilty of wrongful conduct and injuring someone, his estate is responsible whether it be for an action for personal injuries or

for wrongful death.

The same type of reasoning was used by the Colorado Supreme Court in the case of *Fish v. Liley, et al.*, 1949, 208 P. 2d 930. This was an action for wrongful death against the administratrix of an alleged negligent driver. In said case, the tort feasor died before the decedent. The Colorado law provided for wrongful death actions in cases where the act of the defendant would have entitled the decedent to an action had he lived and also that all actions except actions including trespass for injuries to person shall survive against representatives of the tort-feasor. The court held, first, that the death act in Colorado was not a survival statute and that it created a new action which arose on the death of the victim for damages to the wife by reason of the husband's death. The court held in answer to a similar contention made by the defendant in that case, that the plaintiff was entitled to maintain such a death action. At page 934, the court stated in part:

> "The plaintiff's right of action under the statute was in existence and inchoate at the time of the commission of the wrongful act by Drennan resulting thereafter in the death of her husband."

Also, the court stated on page 934:

> "It is important to note that the Death Act is silent concerning the time at which the death and the resultant damages must occur in order for liability thereunder to attach. The Act does not provide that in the event that the tortfeasor dies first no action can be maintained against his representatives by either the injured party or by his

> beneficiaries under the Statute. If such a result obtains it results from the common law and it can only follow if the statutory provisions have not brought about a change in the common law."

The Third Circuit Court of Appeals in the case of *Ehrlich v. Merritt*, 96 F. 2d 251, similarly dealt with the same arguments which defendant makes in the case at bar, in a case interpreting the statutes of New Jersey. That also was a wrongful death action against the estate of a driver who died before the death of the passenger victim. The New Jersey statute gave the representative of the deceased injured party the right to sue the tort feasor for damages which said deceased could have recovered had he lived. Another section allows the representative of the deceased person to sue the wrongdoer's representative in the case where the wrongdoer has committed a trespass against the person or property of another. The court held that these statutes were to be liberally construed, that the latter statute provides liability for trespasses committed while alive and makes no distinction as to the cases where the tort feasor dies first. At page 254, in dealing with such an argument made by the defendant in that case, the court stated:

> "This argument is not only contrary to the remedial purposes of the two statutes involved, but is also unwarranted by the wording of the statutes themselves."
>
> "* * * It makes no distinction between cases in which the tortfeasor predeceases the injured party and cases in which the injured party predeceases the tortfeasor."

The court further stated that courts of New Jersey have repeatedly held that these statutes, being remedial, must be liberally construed, and that the courts interpreting them should at all times seek to "supress the mischief and advance the remedy." The foregoing case was also cited in the Fretz case at page 649.

A series of cases from the State of Michigan further touches the argument herein made. See *Ford V. Maney's Estate*, 232 N.W. 393; *Justin v. Ketcham*, 298 N.W. 294, and *In re Olney's Estate*, 14 N.W. 2d 574.

In keeping with the theory of liberal construction, the court in the Justin case stated:

> "No authorities have been cited that, at common law, survival from the initial injury in fact, although for a short time, was not sufficient to permit a cause of action to vest. There is no good reason for restricting the terms of our survival act, which are general, nor for creating legal fictions in order to relieve a wrongdoer from the consequences of his wrong."

In both the Justin and Olney cases, the tort-feasor died before the injured person, and the question was whether or not, under common law rules, a cause of action accrued upon which the survival act could operate. It is respectfully submitted that in none of the foregoing cases are the statutes as clear and direct as the Utah statute.

In rejecting Massachusetts cases which were cited by defendant in his memorandum in the case at bar, the Supreme Court of Erie County, New York, in the case of *Maloney v. Victor*, 25 N.Y.S. 2d 257, dealt with the same

question, although it arose in another manner. That case was an action against defendant's testator for personal injuries and property damage where the complaint alleged that the collision resulted in the immediate death of the testator. The defendant argued that there could be no survival because the defendant testator was killed immediately. The survival statute in New York stated:

> "No cause of action for injury to person or property shall be lost because of the death of the person liable for the injury."

The court stated at page 258:

> "I do not regard this as being designed merely to keep alive an existing cause of action which would have abated at common law by the death of the person against whom it existed. It was manifestly the intention of the Legislature that where injury to person or property was caused by the act or neglect of a person who would have been liable therefor had he survived, it should give rise to liability notwithstanding the death of that person. This view charges the estate of the deceased person with liability even though the cause of action should not have arisen until after the death of the person causing the damage provided that damage was due to his otherwise actionable act or neglect."

Defendant cited to the trial court as being squarely in point on the proposition which he asserted, the case of *Youst v. National Bank of Jackson, Executor* (Mich.), 42 N.W. 2d 110. This was a case interpreting the Alabama law and dealt with a statute which stated in part as follows:

> "* * * Such action shall not abate by the death of the defendant, but may be revived against his personal representative; * * *"

The Court in that case went off strictly on the words in the statute *"an action"* instead of *"a cause of action."* The court stated that this statute dealt only with lawsuits which had already been filed prior to the death of the wrongdoer. A later Alabama case, *Shirley v. Shirley*, 1954, 73 So. 2d 77, dealing with a statute that had been amended since the Yount case in a death action *where the plaintiff's deceased died before the defendant's deceased,* stated that even in that situation, the statute prior to the 1951 amendment would not have allowed such an action inasmuch as it dealt with actions that had been filed prior to the death of defendant. The Yount case, on which the trial court in the case at bar apparently relied, is clearly not in point.

Another clear statement of philosophy here urged was made by the Minnesota Supreme Court dealing with a similar contention made by the defendant in the case of *Kuhnle et al. v. Swedlund*, (1945) 20 N.W. 2d 396, at page 398:

> "However, whether the right so created by the statute be deemed a new cause or right of action seems immaterial in this connection. As is well stated in 25 C.J.S. Death, par. 23: 'Whether the cause of action under the statute is deemed a transmitted right, a survival right, or an independent cause of action, the foundation and gist of it in all cases is the wrongful act which produced the injury resulting in the death.'"

Other cases dealing with the same fundamental argument which could be helpful to this court are as follows: *Cash v. Addington, New Mexico* (1942) 131 P. 2d 265; *Blakeley v. Shortal's Estate, et al.*, Iowa (1945) 20 N.W. 2d 28; *Devine v. Healy*, Illinois (1909) 89 N.E. 250, (cause of action is the same whether action be brought by person injured in his lifetime or by his administrator after his death has been occasioned by the tort; the only difference being that the measure of recovery is not the same).

CONCLUSION

78-11-12, Utah Code Annotated, 1953 clearly allows actions for personal injury or death against defendant's wrongdoer, without limitation. The statute makes no distinction as to who dies first. The only thing of importance is whether or not the injuries or death were caused by the negligence or wrongful conduct of the deceased while alive. The defendant seeks to import a hypertechnical fiction from the common law to defeat the obvious intent of the statute. An interpretation as contended by defendant would emasculate the aforesaid statute and thwart the obvious intent of the Utah Legislature as appears from the wording of the statute and the title of the act, and this, created in the atmosphere of the Utah Constitution, which expressly forbids the abrogation of the right of action to recover damages for injuries resulting in death. Furthermore, cases heretofore cited from other jurisdictions have uniformly abolished such nice distinctions and hypertechnical exercises of the mind as have been indulged in by defendant in the

case at bar. These cases have recognized the basic principles that the foundation of a right of action for wrongful death is the original wrongful injury and that the subsequent death of the injured person is merely a final event which causes the pre-existing liability already created to ripen into a wrongful death action. The cases cited herein have stated that the liability exists from the moment of the wrongful act by the defendant and that, from that moment, a wrongful death action in an inchoate form exists and finally ripens, on the death of the injured person, into a full blown wrongful death action.

It is submitted that cases cited herein in favor of plaintiff's argument are cases in jurisdictions that do not have as clear an expression of legislative intent as we have in the State of Utah, where the Legislature has made it unequivocally clear that the wrongdoer's estate is liable for death caused by his wrongful conduct without exception. We urge this court to give effect to that clear legislative intent and to reverse the ruling of the trial court dismissing the action as against the estate of the deceased wrongdoer.

Respectfully submitted,

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RECEIVED ..... copies of the within Brief

of Appellant this.....day of....., 1959.

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Counsel for Respondent